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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

AMERICAN CONTRACTORS INDEMNITY COMPANY, Plaintiff and Respondent, v. TIM WILKENS et al., Defendants and Appellants.	A130898 (Napa County Super. Ct. No. 2651329)

Plaintiff American Contractors Indemnity Company (ACIC) issued performance and payment bonds in connection with a subdivision development, and in consideration for the bonds obtained an indemnity agreement in which several indemnitors agreed to indemnify ACIC for any losses. The indemnity agreement was signed on 10 separate signature lines, five of which were signed by defendant Tim Wilkens in five different capacities, one as "Tim Wilkens, individually."

A subcontractor made a claim on the bond, which ACIC settled. It then pursued its claim against the indemnitors, and ultimately sought summary judgment for the undisputed amount of its loss. Tim Wilkens, an individual, was the only defendant who opposed the motion, and he lost, the trial court granting summary judgment. Wilkens appeals, with two arguments: (1) he is not individually liable as an indemnitor; and (2) there is a "genuine issue of fact regarding mistake." We conclude that neither argument has merit, and we affirm.

BACKGROUND

The Project and the Bond

Effective March 1, 2007, American Canyon Venture, LLC (Venture), as developer, entered into an improvement agreement with the city of American Canyon. The improvement agreement was in connection with the development of the Valley Vista subdivision, and was signed on behalf of Venture by Tim Wilkens, signed under the following signature block;

> "DEVELOPER
> American Canyon Venture, LLC
> by American Homes Development
> Corporation, Managing Member
> By: _____
> Tim Wilkens, President and CEO of American Homes
> Development Corporation, Managing Member."

The improvement agreement required that Venture obtain contract security and labor and material bonds, which Venture obtained from ACIC.

In connection with the issuance of the bonds, ACIC obtained a general indemnity agreement (Indemnity Agreement). The Indemnity Agreement was on a standard form, six pages in length, and ended with this: "IN WITNESS WHEREOF, the Undersigned, intending to be legally bound hereby, have executed this Agreement. Corporate and all individual signatures must be acknowledged by a notary."

Ten lines for signatures followed, five of which were signed by Tim Wilkens, in five separate capacities: (1) "President of American Homes Development Corporation," manager of Venture; (2) "President" of American Homes Development Corporation; (3) "Trustee and Trustor" of The Suzanne Wilkens 2005 Irrevocable Trust; (4) "Trustee and Trustor" of The Timothy Wilkens Jr. 2005 Irrevocable Trust; and (5) "Tim Wilkens, Individually."[1] The signatures were notarized.

[1] The Indemnity Agreement was also signed by HOM Company LLC, Raymond Ruiz, Madelyn Ruiz, and Raymond Ruiz as trustee of the Ruiz Family Trust.

Under the Indemnity Agreement the indemnitors agreed to indemnify and hold ACIC harmless "from and against any and all demands, liabilities, losses, costs, damages, attorneys' fees and expenses of whatever kind of nature" ACIC may sustain, including: "2.1 Sums paid including interest thereon . . . or liabilities incurred in the settlement or adjustment of any and all claims, demands, damages, costs, losses, suits, proceedings, or judgments under such Bonds."

The Claim and the Lawsuit

Dolzadell Backhoe and Excavating, Inc., a subcontractor on the development project, made a claim against ACIC in the amount of $286,906 for labor and material supplied on the project, and filed suit to recover it. (*Dolzadell Backhoe and Excavating, Inc. v. American Canyon Ventures, LLC* (Super. Ct. Napa County, No. 26-41442) (the Dolzadell claim).)

Seeking to obtain indemnity for the Dolzadell claim, ACIC filed its own complaint against the named indemnitors. The complaint alleged claims for breach of contract, specific performance, and declaratory relief, and sought the $286,906 amount sought by Dolzadell, plus attorney fees and costs.

ACIC was able to settle the Dolzadell claim for $150,000, in connection with which it obtained a release. ACIC then amended its complaint against the indemnitors to reflect the reduced amount it was seeking, to now seek the settlement amount, plus attorney fees and costs.[2]

The Motion for Summary Judgment

On August 14, 2010, ACIC moved for summary judgment against the indemnitors, seeking $213,211.51, an amount it claimed was undisputed. The motion was simple and straightforward, with only 12 facts listed in ACIC's separate statement, facts supported

[2] ACIC had hired a law firm to defend the Dolzadell litigation and bring the indemnity action, and the attorney expenses were within the Indemnity Agreement. (See ¶ 2.2 ["Expenses paid or incurred in connection with claims, suits, or judgements [*sic*] under such Bonds"] and ¶ 2.6 ["Attorney's fees and all legal expenses related to any items herein, including in-house attorney's fees, costs and expenses; investigation, accounting or engineering services."])

by the declarations of two ACIC executives who authenticated the pertinent documents. The motion was set for hearing before the Honorable Francisca P. Tisher.

On October 25 opposition was filed to the motion, on a pleading identifying counsel as attorneys for Wilkens in three capacities. The opposition did not dispute the amount sought by ACIC, and the only substantive opposition we can discern was on behalf of Tim Wilkens, individually. And that opposition hardly contested ACIC's undisputed facts, Wilkens "disput[ing]" only four of them, with each dispute in identical language: "Defendant Timothy Wilkens is not an indemnitor under the General Indemnity Agreement."

The thrust of Wilkens's primary position below—in virtually the identical language he urges here—was as follows: "Mr. Wilkens signed the agreement in the places filled out for him to sign. The fact that he signed the General Indemnity Agreement as an individual as well *does not make him* an 'Undersigned' as defined under the General Indemnity Agreement, Section 1.5, because he did *not, individually, sign the agreement as either a Principal or as one of the indemnitors, which were clearly listed in the agreement by Plaintiff*." Alternatively, Wilkens contended that there was a triable issue of fact as to "mistake."

The sole factual support for Wilkens's position was his declaration, which consisted of five paragraphs. The first paragraph identified him, and the second attached the Indemnity Agreement. The last three paragraphs then said this:

"3. Plaintiff American Contractors Indemnity Company provided the form, General Indemnity Agreement, with the names of the Principal and the Indemnitors filled out on page 6 of the agreement. The terms of the General Indemnity Agreement were not negotiated. American Canyon Venture, LLC, is designated as 'the Principal' under the General Indemnity Agreement on page 1 and 6. American Homes Development Corporation, HOM Company LLC, The Suzanne Wilkens 2005 Irrevocable Trust, The Timothy Wilkens Jr. 2005 Irrevocable Trust, and The Ruiz Family Trust dated April 9, 1998 are designated as 'Indemnitors', with their names inserted against the section 'Indemnitors' on page 6 of the General Indemnity Agreement.

"4. I signed on behalf of the Principal, and also for the indemnitors American Homes Development Corporation, The Suzanne Wilkens 2005 Irrevocable Trust, and the Timothy Wilkens Jr. 2005 Irrevocable Trust.

"5. I signed the General Indemnity Agreement in the places filled out for me to sign. When I also signed as an individual, I did not understand from reading the General Indemnity Agreement that I was being bound as an individual indemnitor nor did I intend to be an indemnitor individually. I understood the indemnitors under the General Indemnity Agreement were those listed on the General Indemnity Agreement by Plaintiff as Indemnitors . . . . I understood that I was signing as an individual acknowledging that the Wilkens trusts were being bound as indemnitors."

ACIC filed a reply, following which Judge Tisher issued a tentative ruling which, addressing the issues in thoughtful fashion, granted the motion. No one called to contest, and on December 1, 2010, Judge Tisher entered a formal order granting the motion. The order read in pertinent part as follows:

"[ACIC] has presented evidence showing that defendants agreed to indemnify it for its losses related to a bond issued for a development project. The sole opposition to the motion is brought by Defendant Wilkens, in his individual capacity. Mr. Wilkens argues the indemnification agreement is ambiguous as to whether he, as an individual, is liable under the agreement because his name is not listed on the line for indemnitors. Mr. Wilkens also presents evidence that he subjectively believed he was not bound by the indemnity agreement as an individual.

"The interpretation of a contract involves 'a two-step process: "First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. [Citation.]" ' (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351.)

"As the first step in the contract interpretation process in this case, the court has considered the evidence offered in opposition to the motion, i.e. Wilkens'[s] declaration and attached exhibits, to decide whether the language of the parties' indemnification agreement is reasonably susceptible to the interpretation urged by Wilkens. After careful review of the evidence, the court concludes the indemnification agreement is not reasonably susceptible of the interpretation that Wilkens and the other individuals who signed it in their individual capacity (in addition to their capacity with the other indemnitors) were not bound as indemnitors under the agreement as indemnitors. The court makes this determination as a matter of law."

Judge Tisher then turned to Wilkens's second argument:

"Wilkens also argues that there is a question of fact as to whether he would be entitled to rescission of the agreement because he was mistaken as to his individual liability thereunder. Again, the court disagrees. 'Mistake to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may be fairly expected from a reasonable person.' (*Roller v. California Pacific Title Ins. Co.* (1949) 92 Cal.App.2d 149, 153 [citations omitted].) For Wilkens to have been mistaken regarding his individual liability under this indemnity agreement can only be explained as a failure to exercise a reasonable degree of diligence in executing the contract."

So, Judge Tisher concluded, "none of the defendants [has] shown a triable issue of fact as to their liability under the agreement . . . ."

Judgment was entered on December 6, 2010.

The Appeal

On January 7, 2011, a notice of appeal was filed. Although it was Tim Wilkens alone who opposed the motion for summary judgment, the appeal purported to be on his behalf in four capacities: Tim Wilkens, an individual; Tim Wilkens as Trustee of both the Suzanne Wilkens 2005 Irrevocable Trust and the Timothy Wilkens 2005 Irrevocable Trust; and HOM Company, LLC. No argument is put forward in the briefs except on behalf of Tim Wilkens, individually.

DISCUSSION

Summary Judgment and the Standard of Review

Code of Civil Procedure section 437c, subdivision (c), provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. As applicable here, a moving plaintiff can meet its burden by demonstrating by admissible evidence each element of its "cause of action" entitling it to judgment. (See *Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1287 (disapproved on other grounds in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855, fn. 23); *S.B.C.C., Inc. v. St. Paul Fire & Marine Ins. Co.* (2010) 186 Cal.App.4th 383, 388.) At that point, the burden shifts to defendant "to show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1).)

"In reviewing a trial court's grant of summary judgment, we apply the following rules: ' "[W]e take the facts from the record that was before the trial court when it ruled on the motion" ' and ' " ' "review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' " ' [Citation.] In addition, we ' "liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." ' [Citation.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039.)

Summary of Wilken's Position

Wilkens's position here is identical to his position below,[3] and consists of two arguments: (1) he is not individually liable as an indemnitor; and (2) there is a "genuine issue of fact regarding mistake."

We begin by noting what Wilkens's opposition does not dispute: the amount claimed by ACIC; the liability of the other entities on whose behalf he signed the

[3] Though we have not compared the memorandum filed below with the brief here word for word, a cursory review indicates that the materials may be identical.

Indemnity Agreement; and that he signed the agreement as an individual. What he disputes—and it is all he disputes—is that his signature makes him *individually liable* for ACIC's loss. The crux of his argument is that his name is missing from the list of the indemnitors listed on page 6 of the Indemnity Agreement above the signature lines and, therefore, he is not an "Undersigned" bound by the terms of the agreement. He also adds a subjective gloss, claiming that he did not understand from reading the Indemnity Agreement that he was being bound individually and he did not intend to be an individual indemnitor.

We are not persuaded. Judge Tisher had it right.

The Indemnity Agreement Is Not Reasonably Susceptible Of The Interpretation Urged By Wilkens

"The interpretation of a written instrument . . . is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence." (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865; see *Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604.)

" 'The parol evidence rule generally prohibits the introduction of any extrinsic evidence to vary or contradict the terms of an integrated written instrument. (Code Civ. Proc., § 1856.) It is based upon the premise that the written instrument is the agreement of the parties. [Citation.] Its application involves a two-part analysis: 1) was the writing intended to be an integration, i.e., a complete and final expression of the parties' agreement, precluding any evidence of collateral agreements [citation]; and 2) is the agreement susceptible of the meaning contended for by the party offering the evidence? (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33.)' [Citation.]" (*Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal.App.4th 1358, 1364.)

Wilkens signed the agreement under "Indemnitors," and above the line reading "Tim Wilkens, Individually." He is therefore an "Undersigned," defined in paragraph 1.5 as: "The parties, whether as Principal or as an indemnitor, who have executed this Agreement, or who have adopted or assumed this Agreement, or the obligations of this Agreement."

"Undersigned"—not indemnitor—is the defined term used repeatedly throughout the Indemnity Agreement. It begins in the preamble, which recites: "This General Indemnity Agreement is made and entered into this 18th day of May, 2007 by and between the *Undersigned* for the purpose of indemnifying Surety as herein defined . . . ." (Italics added.) And it ends in the concluding paragraph: "IN WITNESS WHEREOF, the *Undersigned*, intending to be legally bound hereby, have executed this agreement." (Italics added.)

The crucial "INDEMNITY" paragraph recites: "In consideration of the execution and delivery by the Surety of a Bond or any Bonds on behalf of the Principal, the *Undersigned* agree to indemnify and hold the Surety harmless from and against any and all demands, liabilities, losses, costs, damages, attorneys' fees and expenses . . . ." (Italics added.)

Wilkens contends that "Undersigned" does not include him, because he is not the principal, nor is he an indemnitor by virtue of his name being excluded from page 6 above the signature blocks. ACIC's description of this argument is spot on: "This is a tortured construction. It elevates an undefined term to the status of a defined term, exalts form over substance and effectively nullifies Wilkens' 5th signature on the indemnity agreement above the line reading 'Tim Wilkens, Individually.' "

The Indemnity Agreement must be read as whole, "to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265.) And a deliberately executed contract is presumed to express the intention of the parties. (*Welk v. Conner* (1929) 102 Cal.App. 286, 289.) Wilkens executed the Indemnity Agreement as an

individual. His signature was notarized as an individual. And he is bound as an individual.

Wilkens describes his claimed subjective intent in signing the Indemnity Agreement as follows: "I did not understand from reading the General Indemnity Agreement that I was being bound as an individual indemnitor nor did I intend to be an indemnitor individually." Such intent is not relevant in determining the meaning of contract language. (See *Stewart v . Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1587 ["assent to contract is based upon objective and outward manifestations of the parties; a party's 'subjective intent or subjective consent,' therefore is irrelevant"]; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.)

Wilkens's first argument has no merit. Likewise, his second.

There Is No Triable Issue of Fact on Mistake

Wilkens's other argument is that there was a triable issue of material fact on rescission, based on his "mistake" as to his individual liability. This argument is premised on the same fundamental premise as his first argument—that his name was omitted from the list of indemnitors on page 6 of the Indemnity Agreement, and that he relied on that list when he signed the agreement and did not understand that he was liable individually. The argument fails.

Civil Code section 1577 says that relief may be granted for mistake "not caused by the neglect of a legal duty on the part of the person making the mistake." This means that a person is not entitled to rescind if his predicament is caused by his own negligence and there is no fault on the other party. (*Mesmer v. White* (1953) 121 Cal.App.2d 665, 673 ["defendant had notice of facts sufficient to put her on inquiry" as to ownership of disputed stock]; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1816-1817 [modification of rental agreement to name lessor as additional insured under lessee's policy was not invalid where lessee's mistaken impression that it was required to do so was result of its failure to read agreement]; see generally *Roller v. California Pacific Title Ins. Co., supra,* 92 Cal.App.2d at pp. 152-153.)

As noted, the evidence showed that Wilkens signed the Indemnity Agreement five separate times, in five separate capacities, one of which was "in his individual capacity." As Judge Tisher observed, "For Wilkens to have been mistaken regarding his individual liability under this indemnity agreement can only be explained as a failure to exercise a reasonable degree of diligence in executing the contract." We could not agree more.

Indeed, Wilkens' own sworn testimony—"I signed the General Indemnity Agreement in the places filled out for me to sign"—underscores his lack of diligence and failure to make a reasonable effort to understand the terms of the agreement. Such failure forecloses rescission based upon mistake of fact. (See, e.g., *Stewart v. Preston Pipeline Inc., supra,* 134 Cal.App.4th at pp. 1586-1587 [plaintiff failed to raise a triable issue of material fact regarding rescission of settlement agreement based upon his failure to read it or understand its terms or consequences]; *Casey v. Proctor* (1963) 59 Cal.2d 97, 105 [plaintiff's failure to recognize that release included a discharge of liability for personal injuries caused by own neglect did not entitle him to rescind the release].)

The few cases cited by Wilkens are not to the contrary. *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261 (*Donovan*) is cited by Wilkens for the proposition that "the Court adopted as California law the rule set forth in the Restatement Second of Contracts, § 153(a), authorizing rescission for unilateral mistake of fact when enforcement would be unconscionable." Or, as Wilkens puts it, ACIC "cannot play 'Gotcha' and the doctrine of mistake prevents this from occurring." *Donovan* is easily distinguishable.

Donavan involved a suit against a Lexus dealer which had advertised a used car in a newspaper for a price significantly less than intended, which incorrect price was inserted by the newspaper. Plaintiff tried to purchase the car at that price; defendant refused to sell; and plaintiff sued for breach of contract. The trial court entered judgment for defendant, on the ground that the mistake in the advertisement precluded the existence of a contract. The Court of Appeal reversed, and the Supreme Court reversed the Court of Appeal, holding that rescission was warranted because the evidence showed that the dealer's unilateral mistake of fact was made in good faith, and that to enforce the contract with the erroneous price would be unconscionable. (*Donovan, supra,* 26 Cal.4th at

pp. 291-292.) In the court's words: "Defendant's mistake in the present case . . . did not consist of a subjective misinterpretation of a contract term, but rather resulted from an unconscious ignorance that the Daily Pilot advertisement set forth an incorrect price for the automobile." (*Id.* at p. 279.) *Donovan* does not support Wilkens's mistake theory.

Wilkens cites two other cases, as follows: "*M.F. Kemper Constr. Co. v. City of L.A.* (1951) 37 Cal.2d 696, 701 (relief granted to mistaken party); *see also Bldg. Serv. Emp. Pension Tr. v. Amer. Bldg. Maint.* (9th Cir. 1987) 828 F.2d 576, 578 (applying California law; unilateral mistake in a demand letter should have been known to other party.)" Neither case avails him.

Kemper involved a construction company which had submitted a bid on a public construction project that due to the "inadvertent" omission of a $301,769 item was $270,000 to $500,000 less than the three other bids received by the City. The City sued to enforce the bid and lost, the trial court cancelling the bid based on unilateral mistake. The Supreme Court affirmed, holding as follows: "Rescission may be had for mistake of fact if the mistake is material to the contract and was not the result of neglect of a legal duty, if enforcement of the contract as made would be unconscionable, and if the other party can be placed in statu quo." (*M.F. Kemper Constr. Co. v. City of L.A., supra,* 37 Cal.2d at p. 701.) That is hardly the situation here.

Bldg. Serv. Emp. Pension Tr. v. Amer. Bldg. Maint., supra, 828 F2d 576 is similar. There, plaintiff trust sought rescission of a settlement agreement with an employer regarding payment of interest on delinquent contributions. The District Court granted summary judgment for the employer. The Ninth Circuit reversed, finding a triable issue of material fact whether the employer's attorney should have known of the mistake by the trusts' attorney regarding the amount of interest owed: "Based on the record before us, we cannot foreclose a finding of fact that a reasonable person should have known about the mistake, given the clue contained in attorney Leavy's letter. [¶] . . . [T]he law provides for rescission when a party knows of his adversary's mistake, and then conceals it to his own advantage." (*Bldg. Serv. Emp. Pension Tr. v. Amer. Bldg. Maint., supra,* 828 F.2d at p. 578.) This, too, is not the situation here.

DISPOSITION

The judgment is affirmed. ACIC shall recover costs.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.